Wayne Foods, Inc. d/b/a Clara's Restaurant and Bonnie Panyard Storm, Case 25-CA-12907

July 30, 1982

DECISION AND ORDER

By Chairman Van de Water and Members Fanning and Hunter

On March 31, 1982, Administrative Law Judge Karl H. Buschmann issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Wayne Foods, Inc. d/b/a Clara's Restaurant, Fort Wayne, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT threaten our employees or make coercive statements to our employees or discourage them from filing charges or otherwise seeking redress under the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in

the exercise of the rights guaranteed them in Section 7 of the Act.

WAYNE FOODS, INC. D/B/A CLARA'S RESTAURANT

DECISION

STATEMENT OF THE CASE

KARL H. BUSCHMANN, Administrative Law Judge: This case arose upon a charge filed on November 24, 1980, by Bonnie Panyard Storm that Wayne Foods, Inc. d/b/a Clara's Restaurant, unjustly discharged her on October 10, 1980. The complaint alleges that Respondent's conduct, including the discharge of Storm and a threat to an employee, violated Section 8(a)(1) and (4) of the National Labor Relations Act (the Act). The complaint issued on April 30, 1981.

Respondent denies the commission of any unfair labor practices in its answer filed on May 11, 1981.

The complaint was amended on January 11, 1982, alleging that Respondent had committed an additional violation of Section 8(a)(1) of the Act.

A hearing was held before me on January 18, 1982, in Fort Wayne, Indiana. The General Counsel and Respondent filed briefs on February 16 and 17, 1982, respectively. Based on the entire record in this case and my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

Respondent, Wayne Foods, Inc. d/b/a Clara's Restaurant, is an Indiana corporation. It operates several restaurants, including a facility at Fort Wayne, Indiana. Respondent is admittedly an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The corporate hierarchy included its president, Ronald Cobb, Becky Wilcoxon as manager, and Fred C. Gongaware as the dining room supervisor.

Bonnie Storm had been employed by Respondent as a waitress since June 20, 1979. On October 9, 1980, she was discharged, ostensibly because she had violated the Company's rule which prohibited solicitation by employees on the Restaurant's premises.

The General Counsel does not dispute that Storm had violated the no-solicitation rule, nor that its violation set into motion the events which precipitated this controversy. But the General Counsel argues that the actual motivating factor behind her discharge was her threat to file charges with the National Labor Relations Board.

The record shows as follows: On September 22, 1980, Fred Caleb Gongaware was promoted from a waiter's position to that of a dining room supervisor. Within a week of his appointment, he held a meeting with the dining room staff during which Becky Wilcoxon announced Gongaware's promotion and in which he reviewed the provisions of the employee handbook. With particular emphasis he had pointed out the Company's no-solicitation rule which, in substance, prohibits the employees from soliciting or distributing "literature during actual working time or in working areas." Respondent

¹ We adopt the Administrative Law Judge's finding that employee Storm was discharged on October 8, 1981, before she threatened to file a charge. Although her supervisor, Gongaware, after telling Storm that she was discharged, reneged and told Storm that she was not discharged, it was Manager Wilcoxon, not Gongaware, who had made the decision to discharge Storm, and Gongaware told Storm this when he told her to report for work the following day. And, as the record shows, Wilcoxon never altered her decision to discharge Storm.

had been concerned with the employees' increasing practice of soliciting employees for such products as Amway or Avon merchandise.

Bonnie Storm was not present at the meeting because of illness. When she returned to work, Gongaware briefed Storm about the meeting and specifically referred to the Company's no-solicitation rule. Nevertheless, in early October Storm solicited at Respondent's premises. On October 7, 1980, 1 day prior to her discharge, Storm handed an Avon catalogue to Collen Jones, a fellow employee, at the counter at Clara's Restaurant. Gongaware, who had observed this conduct told Storm: "Now you're not supposed to do that." She answered that he should not tell her what to do, when it was not her worktime. Gongaware replied: "No, but let's keep it that way."

On October 8, 1980, Storm was involved in additional soliciting activities. At or about 5 p.m., this incident occurred, as related by Gongaware:

Well, we were sitting in the waitress station, Jo Lampkins and I; and Bonnie had came over. She was ready to go to work with us. Well, Jo was going home for the evening. She had worked during the day.

Q. Uh-huh.

A. Bonnie came up, handed her an Avon book, and she says—and Jo said that she did not want that.

During the same evening, at or about 7:30, Gongaware reported to Wilcoxon that every employee in the kitchen was reading Avon catalogues. Wilcoxon then observed at least four employees, including an assistant manager, standing in the kitchen perusing such booklets. Later, at or about 9 or 10 p.m. when Wilcoxon was leaving, Storm said to her: "Hey Becky, did you get my Avon book . . . When you go home, ask your mom if she wants any, too." Wilcoxon merely replied, "Oh, I will" and left.

Reacting to Storm's conduct, Wilcoxon told Gongaware that he should be a strong supervisor, that Storm should be fired, and that she would fire Storm if Gongaware would not do so. She stated:

I'm sick of this soliciting business. I'm sick of her mouthing off, sassing everything that's being told to her. But you are her direct supervisor, and I think to show the rest of them that you mean business and that you are in charge, you should be the one to fire her.

At approximately 11:30 that night, Gongaware informed Storm "Bonnie I am going to have to fire you." He requested that she sign the termination notice. Storm refused to sign the paper and began to cry. She told Gongaware that she was pregnant, that her husband was unemployed, and that she would be unable to obtain employment elsewhere. She also stated that she would go to the Labor Board and file a complaint if the Company

would fire her. Gongaware testified that he experienced a change of heart about the discharge, because he felt sorry for her, and because she had threatened him with the Labor Board. He indicated to her that he would change his mind about the discharge and told Storm to report as usual for work the next day.

Storm's recollection of this sequence was that when Gongaware had initially told her of her discharge and after she had expressed her great surprise, and explained her pregnancy as well as her inability to support herself, Gongaware stated: "I don't want to fire you . . . I know you are a good waitress . . . Okay, I'm not going to fire you." And at that point she said: "You just can't do this. Cale . . . I'm going to the Labor Board . . . I have to . . . I can't let you guys fire me for no reason.' Gongaware then reassured her again that she would not be fired and that he would tell Becky Wilcoxon that she should not be terminated. Upon leaving the office, Storm again said: "Well, I'm going to go to the Labor Board, you know, if you're not right about getting my job back. I'm going to go to the Labor Board . . . because they won't get away with-." On the following day, Storm visited the restaurant prior to the beginning of her shift to find out whether she was still employed. Gongaware told her to report for work unless informed to the contrary. Shortly before she left for work, Becky Wilcoxon called her and told her: "I don't care what Cale told you. You're off the schedule." Bonnie Storm asked, "[Y]ou're firing me." And Wilcoxon replied, "[Y]es.'

Of significance was the testimony of Wilcoxon explaining why she insisted on firing Storm. She had felt that Storm should be fired, but because Storm had threatened them with the Labor Board she had decided to call Ronald Cobb. She testified: "I told him—well, I told him the story about how she had been fired and that Cale had backed down and what—and that she had threatened to go to the Federal Fair Labor Board... He said, 'Is the only reason you're considering rehiring her is because she threatened to go to the Federal Fair Labor Board?' And I said, 'yes'.... And he said, 'you cannot live by intimidations and threats. If you would have fired her any way, go ahead and fire her. We'll handle a suit the best we can.'" According to her further testimony, she had fired Storm for soliciting.

The General Counsel, however, argues that the threat to go to the Labor Board was at least a contributing factor if not the main reason for Storm's discharge. In this regard, the General Counsel greatly relies on the testimony of Carrie Ehinger, a waitress employed by Clara's Restaurant. Because Ehinger and Storm had been close friends, Wilcoxon had found it necessary to justify the discharge of Storm to Ehinger to prevent the latter from leaving her job with the Restaurant. During that conversation, Ehinger had asked why Storm had been fired, Wilcoxon replied, "soliciting." Ehinger inquired whether that was the real reason, and she recalled the following conversation during her testimony:

And then I asked her, you know, if that was the only reason. And she said, yes. And it seemed hard to understand because of everybody else, you know, selling everything up there. And so we got to talk-

¹ I discredit Storm's testimony denying Gongaware's reference to the no-solicitation rule. There is no suggestion that the discharge of Storm was set into motion by anything other than her solicitation.

ing, and she told me that Bonnie had backed them up into a corner and she said—and I asked her, you know, what she meant. And she said that other employees had heard Bonnie threaten to go to the Labor Board, and that she didn't want them to feel like they could just say, "Well, I'm going to go to the Labor Board," and not get fired.

Ehinger reported her conversation with Wilcoxon to Storm, in which she repeated Wilcoxon's reasons, i.e., soliciting, and "that she had backed them into a corner, that she was afraid that all the other employees that heard her say that she was going to threaten to go to the Labor Board would just turn around and say that they would take them to the Labor Board and not get fired."

In agreement with the General Counsel and well-established case law, I would not hesitate to find a violation if I thought that the record supported a finding that Respondent had simply retaliated against Storm because of her stated intent to file charges with the Labor Board or that Respondent's conduct would fit the dual-motive test in Wright Line, a Division of Wright Line, Inc., 251 NLRB 1083 (1980). Rather the record shows that soliciting was the reason for Respondent's decision to terminate Storm, while the threat to go to the Labor Boardwhile causing a great deal of concern in the minds of Gongaware and Wilcoxon—would have been the factor in reinstating Storm. The record is clear, and the General Counsel does not dispute, that Gongaware fired Storm not only with Wilcoxon's consent but also at her behest.2 Gongaware, upon seeing Storm's tears and listening to her threat, suggested to Wilcoxon that the termination be revoked. But Wilcoxon, albeit taken aback by Storm's threat because of the possible expense of a lawsuit, had not changed her mind. She called Ronald Cobb and related the situation. His reaction was that Respondent could not be intimidated by threats into rehiring Storm.

It is clear, therefore, that Storm's threat did not form the basis of her discharge. To the contrary, it nearly intimidated Respondent into rehiring her. For these reasons, I cannot find that Respondent violated Section 8(a)(4) and (1) of the Act.

The complaint also alleges that on October 10, 1980, Respondent's manager, Becky Wilcoxon, told Connie Ehinger that Storm had been discharged, inter alia, because she had announced her intention to contact the Board. The record shows that a conversation occurred on October 9, 1980, between Wilcoxon and Ehinger. During that conversation Wilcoxon explained why she had fired Storm and said "that Bonnie had backed them up into a corner . . . that other employees had heard Bonnie threaten to go to the Labor Board, and that she didn't want them to feel like they could just say, 'Well, I'm going to go to the Labor Board,' and not get fired." Wilcoxon's statement quoted here, or any other statement contained in the record, does not support a finding that Wilcoxon had made the alleged statement or voiced

any similar threat. I, therefore, dismiss this allegation of the complaint.

Finally, Respondent was alleged in the amended complaint to have threatened Storm with legal action to recover legal fees and other costs resulting from her filing an unfair labor practice charge in the event Respondent were to successfully defend itself. In this regard, the record contains the testimony of Ehinger who described a conversation between her and Ronald Cobb in early October. During that conversation, Cobb expressed his recognition of her duty to appear and testify pursuant to a subpoena and then made the following statements:

"Bonnie's—" he goes, "I'm going to sue Bonnie for damage of character"— I think—I'm not sure if that's the word he used, but that's what it meant, and that Bonnie would have to pay for his lawyers, his two lawyers, and Cale's time, Becky's time, and his time spent in here because he was saying how much time he had spent, you know, with this trial, and that he told me that to pay Bonnie back that he would have to go bankrupt.

Cobb's statements clearly amounted to threats designed to restrain employees in their rights guaranteed by Section 7 of the Act. In his testimony, Cobb denied that he ever made such statements. However, from my observation of the demeanor of the witnesses, Connie Ehinger impressed me as an honest and truthful witness in all respects. Cobb, on the other hand, appeared evasive and defiant, as witnessed by the following exchange whencounsel for the General Counsel questioned him:

- Q.—you made the comment to her, and I quote, "After I'm done, I told her she may not want to work for me."
 - A. That right.
 - Q. What did you mean by that?
 - A. Just what I said.
 - Q. Would you explain that to me?
 - A. That's it.
 - Q. After you're done, what?
 - A. That was it.
- Q. After you're done, what? She may not want to work for you.
 - A. She may not want to work for me.
 - Q. After you're done with this hearing?
 - A. After we're done with this case, yes.
 - Q. With this case?
 - A. Right.
- Q. She may not want to work for you?
- A. Right

This testimony can certainly be interpreted as a veiled threat of more onerous working conditions. Since it was not fully litigated³ as a separate violation, I am precluded from finding it to be violative of Section 8(a)(1) of the Act. However, it certainly compounds the coercive statements made to Ehinger about his threats to sue

^{*} The General Counsel would not quarrel with the interpretation that Gongaware merely "articulated management's intention to discharge her." (G.C. br., p. 5.) In any case, the record is clear that Wilcoxon, not Gongaware, had determined the termination of Storm.

³ This issue was not alleged in the complaint and is not discussed in Respondent's brief.

Storm. Accordingly, I have no difficulty in finding that Respondent violated Section 8(a)(1) of the Act as alleged.

CONCLUSIONS OF LAW

- 1. Respondent, Wayne Foods, Inc. d/b/a Clara's Restaurant, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
 - 2. Respondent violated Section 8(a)(1) of the Act.
 - 3. All other allegations have not been substantiated.

THE REMEDY

Having found that Respondent has violated Section 8(a)(1) of the Act, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

ORDER4

The Respondent, Wayne Foods, Inc. d/b/a Clara's Restaurant, Fort Wayne, Indiana, its officers, agents, successors, and assigns, shall:

- 1. Cease and desist from:
- (a) Threatening employees or making coercive statements to employees to discourage them from filing

charges or otherwise seeking redress under the National Labor Relations Act.

- (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.
- 2. Take the following affirmative action designed to effectuate the policies of the Act:
- (a) Post at its Fort Wayne, Indiana, facility copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 25, after being duly signed by its authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.
- (b) Notify the Regional Director for Region 25, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply therewith.
- IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found herein.

⁴ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

b In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."